In the Supreme Court of the United States
October Term, 1978

No. 78-174

M. W. ZACK METAL COMPANY, Petitioner,

v.

SS SEVERN RIVER, JANSEN & CO., CONTAM LINIE, and HANS H. JANSEN, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE THE CHIEF-JUSTICE
and THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The petitioner, M. W. Zack Metal Company, respectfully prays this Honorable Court to issue a writ of certiorari to the Court of Appeals, Third Circuit, to review the decision and judgment of that court made May 2,

1978, unanimously affirming the decision and judgment of the United States District Court for the District of New Jersey, denying plaintiff's motion to restore this case to the docket and to amend the libel filed against the vessel "Severn River" by substituting her owner, International Navigation Corporation of Monrovia, Liberia, in her place and stead, which orders of denial by said District Court are Dated October 19, 1976 and July 14, 1977.

OPINIONS BELOW

The opinion and decision of the Court of Appeals has not been reported. Attached hereto is a true copy of the same, as appendix A. The orders and decisions of the District Court of New Jersey have not been reported. Attached hereto are true copies of both said decisions, see appendices B and C, respectively. No reconsideration was sought or held in the Court of Appeals. The decision of the District Court dated July 14, 1977, was on a reargument of its

of its decision of October 19, 1976.

JURISDICTION

The judgment of affirmance in the Court of Appeals is dated May 2, 1978. This petition is being filed within 90 days of that date. The jurisdiction of this honorable court is being invoked under 28 USC 1254 (1).

QUESTIONS INVOLVED

1.) Where petitioner, the owner of a cargo of steel sheets in coils, received them at their destination at Port Newark, New Jersey, in damaged condition, and in order to stop the running of the one year Statute of Limitation as provided by Cogsa, it filed a timely suit in Admiralty in the United States District Court for the Southern District of New York and another timely Admiralty suit in the United States District Court for the District of New Jersey, both of which named the carrying vessel, the Severn River, and her charterers, Jansen & Co, Hans H. Jansen and Contam Linie, all of Hamburg,

Germany, as respondents, and a third suit was commenced in a court at Hamburg, Germany, in personam, against the charterers and the owner of the vessel, International Navigation Corporation of Monrovia, and personal jurisdiction was obtained in the German suit, but it could not be obtained in either of the Admiralty suits. The suit in Germany was prosecuted according to German law, in which the trial court entered separate judgments as separate issues were decided, so that in 1966, the first of the German court's decisions was made holding the charterers liable. A second judgment in June, 1970, was made holding that the per package limiitations under Cogsa and under the Hague rules did not apply, and a third and final judgment was entered on December 7, 1971 in favor of petitioner against all defendants for $64,000 with interest and costs, whereas both the Admiralty suits were dismissed for lack of prosecution for the failure to obtain personal jurisdiction over the respondents; the dismissal of

this suit in the New Jersey district court occurred by an order dated March 24, 1965, entered by the court, sua sponta, which order provided that the dismissal was without prejudice to the right of the petitioner to re-open the proceedings upon good cause shown.

On appeal from the German trial court's judgment, the Appeal Court, on January 9, 1975, entered its decision affirming the judgment as against the charterers in the reduced sum of $33,000 with interest and some costs, but dismissed the suit against the shipowner because of the time-bar provision of Section 901 and 902 of the German Commercial Code which that court said was applicable.

Further litigation ensued as will be hereinafter mentioned and explained and at the conclusion of which, in February 1976, it became obvious that the charterers were not paying the judgment, as affirmed, and it has not been paid to date, and that the application of a local Statute of Limitation to dismiss the action against the owner, according to the Conflict Laws, is not a dismissal on the merits, so that

this petitioner's just claim would be lost unless the Admiralty courts would restore the case to its docket for trial, as a consequence of which, petitioner sought on February 6, 1976, an ex-parte order of the district court of New Jersey, to restore this suit to the docket for trial, and further, it sought permission to substitute the owner for the vessel which had meanwhile foundered and become a total loss in 1967-1968. Wasn't it error for the district court to deny the motion despite the fact that petitioner had not had its day in court on the merits of its cause in Admiralty, and the further fact that laches was neither proven nor claimed by respondents for they claimed no prejudice from the delay and they could not claim lack of diligence?

2.) Wasn't it error for the district court to deny the motion because it said that Cogsa's bar of one year had run in favor of the shipowner, despite its acknowledgment that the suit in Germany against the owner in personam, was

started on May 13, 1961, when the last day, according to an extension of time granted to petitioner to sue, would have expired on May 15, 1961?

3.) Wasn't it error for the district court to acknowledge that timely suits were started in our Admiralty courts against the Severn River, but held that her owner's right to claim the time-bar was not affected by the filing against its vessel?

4.) Wasn't it error for the district court to acknowledge that the Severn River was no longer a viable vessel and no longer subject to in rem process of our Admiralty courts, yet, it used her demise as a reason for holding that it would be futile to restore the case to the docket?

5.) Wasn't it error for the district court to ignore the facts that personal jurisdiction of our Admiralty courts had been defeated by respondent's action in leaving port before a suit could be started and in staying

away from its process and jurisdiction, facts which are indigenous to the general Maritime Law, and hence, the Civil Rules of Federal Procedure should have been interpreted to aid the jurisdiction of our Admiralty courts to try this Admiralty cause instead of being restrictive in treating with Rule 15(c) or the Statute of Limitation of Cogsa. Wasn't such action a denial of due process as was normally available in our Admiralty courts?

CONSTITUTIONAL, STATUTORY and RULES PROVISION INVOLVED

UNITED STATES CONSTITUTION

Article III, Section 2, clause 1, of the United States Constitution reads in its pertinent parts:

"Section 2. The judicial power shall extend * * * to all cases of Admiralty and Maritime jurisdiction."

Clause 2 of said Article III, Section 2, reads in its pertinent parts, after first pro-

viding for the original jurisdiction of this honorable court to cases affecting Ambassadors other public ministers and States, as follows:

"In all other cases mentioned, the Supreme Court shall have Appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as the Congress shall make."

Article IV, Section 2, Clasue 1, reads:

"Section 2. The citizens of each state shall be entitled to all privileges and immunities of the citizens in the Several States."

Amendment V to the United States Constitution reads in part as follows:

"No person shall be deprived of life, liberty or property, without due process of law * * * . "

UNITED STATES CODE PROVISIONS

28 USC 1254. Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the

petition of any party to any civil or criminal case, before or after rendition of the judgment or decree; * * * ."

28 USC 1333. Admiralty, Maritime and Prize cases.

The district courts shall have original jurisdiction exclusive of the courts of the states of:

1. Any civil case of Admiralty or Maritime jurisdiction, saving to all suitors in all cases, all other remedies to which they are otherwise entitled * * * . "

28 USC 1653. Amendment of pleadings to show jurisdiction:

Defective allegations may be amended, upon terms, in the trial or appellate courts.

28 USC 1654. Apeparance personally or by counsel.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectively, are permitted to

manage and conduct causes therein.

46 USC 1300. Bills of lading subject to chapter.

Every bill of lading, or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

46 USC 1301. Definitions; when used in this chapter.

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper * * * . "

46 USC 1303. Responsibilties and liabilities of carrier and ship-Seaworthiness.

* * *

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * *

(6) * * * In any event the carrier and the ship shall be discharged from all liabil-

ity in respect of loss or damage, unless suit is brought within one year after delivery of the goods * * * . "

46 USC 1304. Rights and immunities of carrier and ship-unseaworthiness.

* * *

(5) Neither the carrier nor the ship shall, in any event, be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500. per package lawful money of the United States, or in cases of goods not shipped in packages, per customary freight unit * * * .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. These rules govern the procedure in the United States district courts in all suits of a civil matter, whether cognizable as cases at law or in equity or in admiralty with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 8. General Rules of Pleadings

(e) Pleadings to be concise and direct; consistency.

1. Each averment of pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required * * * .

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 15. Amended and supplemental Pleadings.

(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, * * * . Otherwise, a party may amend his pleading only by leave of court * * * and leave shall be freely given when justice so requires * * * .

(c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the

date of the original pleading. An amendment changing the party against whom a claim is asserted, relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of claims - A party asserting a claim to relief as an original claim, cross-claim, or third-party claim, may join, either as an independent or as alternative claims, as many claims, legal, equitable or maritime as he has against an opposing party.

Rule 19. Joinder of persons needed for Just Adjucation.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the courts of jurisdiction over the subject matter of the action, shall be joined as a party in the action if (1) in his absence, complete relief cannot be accorded among those already parties, or * * * .

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. * * * . All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences, and if any question of law or fact common to all persons will arise in the action. * * * .

Rule 60. Relief from Judgment or Order

(b) On motion, and upon such terms as are just, the court may relieve a party or

his legal representation from a final judgment order, or proceeding for the following reasons:

* * * (5) the judgment * * * is no longer equitable that the judgment shall have prospective application; or (6) or any other reason justifying relief from the operation of the judgment. * * * .

CONCISE STATEMENT OF THE CASE

In January, 1960, petitioner caused to be delivered at Antwerp, Belgium, to Jansen & Co. of Hamburg or its agents at Antwerp, its shipment of 93 coils of sheet steel to be used for automobile bodies for delivery to the port of New York. Said coils were received at Antwerp, placed aboard the SS Severn River bound for the port of New York, for which bill of lading No. 35 was issued, stating that said steel was received on board in good order and condition for transport to New York, and there to be discharged. Freight for the carriage was paid according to weight. The coils travelled unboxed or unpackaged, and had a total

weight of 443 metric tons. The bill of lading was on a form used by Jansen & Co., but it was signed for the master by an agent ashore. The steel was loaded and transported to Newark, New Jersey, but discharged in damaged condition to a lighter employed by the petitioner to receive the steel. The shipment was fully discharged to said lighter on February 16, 1961.

The fact of damage to petitioner's shipment of steel was found by the trial court in Germany to be recoverable of both the Charterers and the shipowner. Thus petitioner's claim to a valid claim for cargo damage has been confirmed by the only court who heard the evidence and considered the merits of petitioner's claim.

Petitioner defeated the respondent's claim to the time-bar of Cogsa by filing a libel in the Southern District Court of New York, on February 11, 1961, where a libel was filed in Admiralty against the Severn River and her charterers, Jansen & Co., Contam Linie and Hans H. Jansen. Furthermore, petitioner had, in 1961, applied for an extension of time to file suit

to May 15, 1961, which extension was granted in writing in February. Besides the filing of the said libel on February 11, 1961, this suit in Admiralty was filed on May 12, 1961, against the same respondents as in the New York suit, and, on May 13, 1961, an in-personam suit was started in Germany against the owner of the Severn River, the International Navigation Corporation of Monrovia, and the charterers. There can be no question that these suits tolled the time-bar of Cogsa's Statute of Limitations and that that defense of time-bar was never vested in the carrier or the ship.

The vessel left the jurisdiction of the Admiralty court in the port of New York immediately upon the completion of discharge in February, 1960. Neither the owner nor the charterers could be reached within the jurisdiction and could not be served with process of either Admiralty court. The suit in New

Jersey was dismissed for failure to prosecute, but its order of dismissal provided that such dismissal was without prejudice to plaintiff's right to re-open the proceedings upon good cause shown. This latter order was entered on March 24, 1965. The reason for the failure to prosecute either suit was petitioner's inability to get jurisdiction over these respondents, despite a watchful alert for the return of the Severn River to these ports, and the suit in Germany appeared to be proceeding under capable handling of appointed German counsel. Only one recovery was sought or could be had.

In 1967 or 1968, unknown to petitioner or their agents, the Severn River foundered on rocks in the Far East, a fact never reported by respondents either to petitioner or to the courts. The suit in Germany progressed in a manner according to German jurisprudence and a judgment was entered in 1966 limited to a finding of liability on the part

of the charterers. Then in June, 1970, a second judgment was entered, finding that the per package limitations, whether under American or Belgium law, were not applicable. Lastly, on December 7, 1971, the German Court of First Instance found the shipowner liable and fixed the recovery at $64,000 with interest and cost against all parties defendants. This last judgment seems to have limited the execution on the judgment, against the owner, to the seizing of the Severn River, because the court further found that said vessel was sailing the seas. All judgment debtors appealed, but only the charterers affected a stay of execution. At this point, petitioner's counsel at Hamburg was advised that no stay would be applied for the owner as the carrying vessel had long since been withdrawn from navigation.

Petitioner thereupon sought to sue the owner upon the judgment by attaching one of its other vessels, if any arrived in the United States. In April, 1973, it was found that the Steamship Virtus, a sister ship of the Severn River, was due to arrive at Norfolk and a suit was commenced in the Admiralty court at Norfolk and the Virtus was seized for jurisdictional and security purposes. A motion to dismiss for failure to serve process properly upon the owner was made. The court held the motion in abeyance and after a time, without filing an answer or motion therefor, new grounds for dismissal were asserted, defendant alleging that the judgment in Germany against the owner was not a judgment in personam, which could reach the general assets of the owner, or, if the complaint were to be read as resting on the original cause of action for cargo damage, that such was time-barred by Cogsa. The court dismissed the complaint in an unpublished decision, upon the various grounds argued for by the shipowner. Feeling aggrieved, as none of the five or six grounds

fixed by the district appeared to be lawful, petitioner appealed. The Court of Appeals, Fourth Circuit, affirmed the dismissal, but only on two of the reasons found by the district court, viz; if the suit was on the German judgment, it failed to state facts sufficient to recover, because the judgment was an "in rem" judgment, and reached the vessel and not the general assets of the owner, or, if the suit was on the original cause of action, it was time-barred by Cogsa's Statute of Limitation.

One week before this decision of the Court of Appeals, the appeal court in Germany published its decision on January 9, 1975. It reduced the judgment against the charterers to $33,000. with interest and costs because of its view of Cogsa' per package limitation and it dismissed the suit against the owner altogether by reason of the application of Section 901 and 902 of the German Commercial Code. As the dismissal of

the German appeal court rendered the "in rem" argument moot, and as the filing of the suits in 1961 had tolled Cogsa's Statute of Limitation, petitioner moved the Court of Appeals to reargue, and, to remand the case to the district court to consider whether the original cause could be prosecuted, calling attention to the court's own treatment of the complaint that it might be held to state the original cargo damage claim in which case, the time-bar had been defeated. The Court of Appeals withdrew its finding of a time-bar for the original cause of action but continued the dismissal because of its view that the judgment was an "in rem" judgment, and it said further, that petitioner had declared upon the judgment and it was not entitled to have its complaint considered as being on the original cause of action. This court denied certiorari. See 510 F.(2) 451, cert. denied, 96 S. Ct. 60, 423 U.S. 875, 46 L.ed(2) 53.

When the charterers failed to pay the

judgment as reduced and after this court had denied certiorari, petitoner, on February 6, 1976, moved to restore the xxxx suit, in the District Court of New Jersey, to the docket for trial. At the same time, it asked permission to name the owner in place and stead of the vessel, as respondent. The application was an ex-parte one. The court demurred for one reason or another. Requests for briefs on specified points of law were made of counsel through the judge's secretary. A hearing was held. (See the correspondence that followed upon these requests, in the Appendix, an exhibit submitted in support of the application.) The court then requested that all copies of the papers be served upon International Navigation Corporation of Monrovia, at Baltimore, Maryland, where it had its principal place of business. Such service was effected. At a second hearing held, at which the owner appeared by counsel, who submitted several reasons why the

motion should be denied and it was. The reasons are important to notice as they were arguments on the merits on behalf of the owner and charterers.

Consequently, arguments on the merits effectively waived service of process but, made the parties litigating the matter on the merits, appear in the action. The arguments advanced were that Cogsa's time-bar applied in favor of the shipowner which would defeat the relation back theory of Rule 15(c) of the Federal Rules of Civil Procedure. In behalf of the charterers, counsel argued that res judicata, by reason of the German court's grant of a recovery to petitioner, would bar this action. This latter argument could refer only to the claim of the charterers, the only one against whom the judgment had been rendered. Also, the transcript of the hearing states the appearance of counsel which clearly states that Lum, Biunno and Tomkins appeared for the defendants, without limitation and in

the plural; see page 49 of the Appendix.

Furthermore, after the denial of the motion, the same counsel submitted a proposed order for signature, providing for the denial of the motion to be "with prejudice" and to include the charterers specifically, within the ambit of the parties favored; see pages 89-90. These are two letters explaining this issue. A copy of the proposed order, unsigned, is on file and it is available to this court, see Davis v. Davis, 305 U.S. 32.

It is respectfully submitted that the arguments on the merits of the issue of restoration by defendant's counsel should have been recognized as a voluntary appearance and the case should have been allowed to proceed to trial.

REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE IN THIS CASE

Under the facts of this case as set forth above, Admiralty would not have had

any difficulty with ordering a trial and an amendment to the libel to name the owner as a respondent even as late as February, 1976. The liberality of treating with the issues, amending pleadings and allowing the parties to plead as necessary, is well illustrated by Benedict J., in Copp v. DeCastro & Donner Sugar Refining Co., 8 Ben. 321, Case No. 3215, where finding that all parties were before the court, each urging arguments in its own interest, Judge Benedict found no difficulty in turning the proceeding from an in personam proceeding to one in rem. He insisted that Admiralty had the power and duty to reach the merits of the matter before the Court. Without further pleadings it awarded its judgment on the merits.

The history of a cargo owner's right to proceed in rem or in personam or both to recover for cargo damage is related in

The Rebecca, 1 Ware 187, Fed. Case #11, 619. That case says that the liability of ship and her owner are one. The difference in proceeding in rem or in personam is one of pursuing a remedy, the one which may be more readily available than the other. In the early admiralty cases, there are many illustrations of an Admiralty court pursuing one remedy or another despite the form of the proceeding, when it had personal jurisdiction. See The Monte A., 12 F. 331; The Phebe, 1 Ware 263; The Adeline, 9 Cranch 244, 3 L.ed. 719; The Commander-in-Chief, 1 Wall 43, 17 L.ed. 609; The Gazelle, 128 U.S. 474, 487; City of Norwich, 118 U.S. 468; Stevens v. The Sandwich, Fed. Cas. #13409; The Freeman v. Buckingham, 18 How.(55 U.S.) 182; The Marianne Flora, 11 Wheat. 1, 6 L.ed. 405 and Du Pont v. Vance, 19 How. 162.

The district court ignored the duty of our Admiralty courts to reach the mer-

its but proceeded to find reasons unsupported by the facts and the law to deny the motion under Rule 15(c) of the Federal Rules of Civil Practice which prohibits an amendment of the libel (complaint) from one party to another, where the Statute of Limitation has run in favor of the party sought to be brought in. Having found that the owner and its ship were different parties and the amendment sought to bring in a new party, the court went on to find that the Cogsa's limitation had barred this suit against the owner, International Navigation Corporation of Monrovia. Yet, the Statute had been tolled and consequently Rule 15(c) was misapplied. Nevertheless the result was that the court had refused to hold a trial of petitioner's cause in Admiralty on the merits, despite assurances that jurisdiction could now be had over all parties. See Rules 19(a) and (b) and 20 FRCP.

Petitioner's case is meritorious for

the good order and condition of its steel upon delivery to the vessel is admitted by the bill of lading. At discharge while still in the hold of the ship, the steel was observed by witnesses to be a dishevelled heap of coils which had broken from their stow and were lying about loose, leaning against one another or on top of one another, with straps broken, and the steel sheets extending from the eye of the coil in telescoped fashion, exposing the edges to breakage, bending and actual tearing. The discharging operation further damaged the coils because the discharge was with chain slings put through the eye of the coil, further cutting the edges, instead of a straight hook being put through the eye and lifting the coil on its end out of the ship onto the waiting lighter. The coils lost their use for automobile bodies because to recondition them meant to shear

the cuts and tears in the edges to its deepest penetration into the whole coil, making their width too narrow for auto bodies. There has never been a defense on the merits suggested by the defendants to this claim in all of these years of litigation. Hence, libellant would recover if a trial of its case were held; see Schnell v. The Vallescura, 293 U.S. 296, 303, 55 S.Ct. 194, 79 L.ed. 373; Edmond Weill, Inc. v. American West African Line, Inc., 2 Cir., 1945, 147 F.(2) 363, 366; Miami Structural Steel Corp. v. Cie Nationale Belge de T.M., 224 F.(2) 566, 568 and Asbestos Corp. v. Compagnie de Navigation, etc. 345 F. Supp. 814, 820. Ignoring the equities of this case and even the admonition by this court, that the Federal Rules of Civil Procedure must be determined to aid the courts in reaching the merits, the truth of controversy, see Conley v. Gibson, 355 U.S. 41, 48; and Foman v. Davis, 371 U.S. 178, court below violated petioner's right

to proceed in our Admiralty courts to remedy a wrong. The district court talked about these principles but did not follow them. Plainly, it entertained and adopted a strained interpretation of the law to say that Cogsa's Statute of Limitation recognized the difference in the liability of the vessel from the liability of her owner for the same cargo damage, despite petitioner's effort at setting the law before the court. Judge Bradly in the City of Norwich, 118 U.S. 468, said in talking about the alleged separate liability of the ship and of the owner for the same wrong, that it would be like talking in riddles. Judge Learned Hand said succinctly about such alleged difference that the personification of the vessel is an anachronism, and had no meaning in substance, see The Carlotta, 48 F.(2) 110, 112. Nor does Cogsa support the district court. The Statute of Limitation of Cogsa is Section 1303(6) and reads:

"In any event the carrier and the ship

shall be discharged from all liability of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. * * * . "

The date of final delivery was February 16, 1960. Suit was brought February 11, 1961. An extension of time to May 15, 1961, to sue that had been applied for in January, was granted after this first suit. A second suit was filed in the District Court of New Jersey on May 12, 1961 and a third suit was commenced in Hamburg, Germany on May 13, 1961. The district court perceived a difference between filing a suit in Admiralty against the vessel and not having included her owner as respondent and found that the Statute had run against the owner. But the court had earlier in its decision recognized that a suit had been started against the owner in personam on May 13, 1961. It did not object to this suit as not

being able to toll the Statute perhaps because it was brought in Germany and not in the United States' Courts, or that the start of it on May 13, 1961 was out-of-time despite the grant of the extension of time to May 15, 1961. It just plainly said that Cogsa's bar had taken effect in favor of the owner. Had the court forgotten about the suit of May 13, 1961? Apparently! Ignoring the conceded fact that the German suit was timely started according to our rules, was an error of law, but petitioner lost its trial on the merits. Such an extension was a lawful grant of time to commence the suit; see Royston Distributors v. Manchester Lines, 1963 A.M.C. 761 (not officially reported.); United Fruit v. Folger, 1959 A.M.C. 2224, 270 F.(2) 572; and Benz Kid Co. v. Kawasaki, 1954 A.M.C. 130 (not officially reported). As the extension of time was asked for by the undersigned counsel of the New York agent of the carriers, New York law would apply. A New York case,

Tashjian v. Chorigian, (A.T. 1st) 183 Misc. 204, states that a written extension of time to such is binding. Bringing "a suit", according to the language of Cogsa, would prevent the vesting of the time-bar provision from accruing. The defeat of the time-bar provision by the bringing of a suit, the Statute said, will affect "The carrier and ship". By force of the Statute "the carrier and the ship" shall be discharged from all liability unless suit is brought. If suit is not brought, it is plain that then the discharge from liability will vest. Diligent search has found several cases deciding that the start of the suit defeats a claim to a time-bar, but no decision by this court. There have been Internatio-Rotterdam Inc. v. Tomson, 4 Cir. 218 F.(2) 514; Unrra v. Mormacmail, 99 F. Supp. 552, and Ore S/S Co. v. Hassel, 2nd Cir., 137 F.(2) 326, 329. Perhaps if this court had examined the Statute and ruled on it, the district court might not have ignored as it did the decisions of other circuits. At least, there is a clear conflict

between the Third Circuit on the one hand and the Second and Fourth Circuits on the other. Furthermore the Court of Appeals, Fourth Circuit, in M. W. Zack Metal Co. v. International Navigation Corp. of Monrovia, 510 F.(2) 451; (a case on the same facts of this case) found that the bar of Cogsa was tolled by the earlier filing of suits herein above mentioned. Stare decises should have applied to the consideration of the same point in this case, but it wasn't. The reported opinion of the Fourth Circuit, above, does not tell the whole story, because that is its decision on reargument. Its first decision had held a time-bar but upon reargument, the court withdrew the alleged time-bar as a reason for dimissal of that suit. Attached as Appendix D is a true copy of said decision. The point is a material point involving the exercise of the Admiralty court's jurisdiction in a manner that has been traditional with them.

Its duty to do equity has been its strength which was made necessary by its dealing with ships and other immutable facts indigenous to a ship leaving port after discharging her cargo may escape liability by never returning to the jurisdiction of our courts. This is a reason for applying the liberality of general Maritime law. Another is that the charterers were residents of Germany and in 1961, they could not lawfully be served with process. Petitioner was required to file suit to avoid Cogsa's Limitation Statute, nevertheless. Judge Benedict's feeling in the Copp case, which had gotten quite complicated by the number of parties in interest, was that delays in the trial of an Admiralty matter was an expected event and where all was ready for trial, the trial should be had, regardless of procedural refinements. Equity practices have not been denied to Admiralty by the 1966 unification of actions under the Civil Rules. There is

no statements by this court stripping Admiralty of its powers in equity and dealing with litigants as it would under earlier Admiralty practices. Admiralty must still deal with maritime affairs that involve ships, distances and the resort to foreign tribunals whenever a maritime claim is sought to be enforced.

Benedict on Admiralty, calls attention to the facts of maritime matters which have shaped the duty of Admiralty at chapter 466 which states: "* * * , Such limitations have usually been subject to exceptions which have their foundation in the inconvenience or the impracticality of sooner enforcing the demand as in the case of persons beyond the sea. The prevalance of such exceptional situations in Maritime litigations justifies the more flexible maritime doctrine of equitable laches."

Yet, the court went on its inexorable way of avoiding reading the rules in a way

to favor the disposition of this Maritime case upon the merits. It not only found a time-bar under Cogsa when it had been defeated by the action of the start of suit, but it went on to perceive a difference in the personality between ship and owner, which many other courts have disowned; see Continental Grain Co. v. Barge F.B.L. 565, 344 U.S. 19; and its progeny such as Construction Aggregates Corp. v. SS Azalea City, (DC.N.J.), 399 F. Supp. 662; Norfolk Ship & Dry Dock Corp. v. M/Y LaBelle Simone, 375 F. Supp 985 and Hamilton v. Canal Barge Company Inc., 395 F. Supp. 978. All held that liability of vessel and owner were the same. This is not to say that the available remedies to the holder of a maritime lien are the same. There is a distinction between a liability and remedies which was not made by the district court and that lack, should have been noted by the Court of Appeals.

The district court went further. It interpreted the limitations of Rule 15(c) on amendments to a complaint in claiming to change the name of defendant as though those limitations were to be favored. To conclude that those limitations prevented a grant of permission to change the owner for the ship as a party defendant, the court restated the issues before it at page 4 of its decision recognizing that the rule of laches had been urged upon it and that a liberal construction of the rules to the end that the merits should be reached was also urged upon it, but these urgings were without more disregarded. The rights of litigants to be relieved of the effects of an order or judgment, when it is no longer equitable to enforce its effect as is granted in Rule 60(b) 5 and 6, was recognized but not decided by the court. This was an abuse of discretion; see System Federation No. 91 v. Wright, 364 U.S. 642. At page 4 of its decision, the court said of petitioner's

claim: "Plaintiff's exclusive purpose in bringing this motion is to receive an adjucation on its claim for damage with respect to International." This is not so. The motion was to restore the whole case to the docket including the restoration as to the charterers. The charterers could now be brought in by service of its process upon the agent of its insurer who is located in New York City. This convenience was not in existence in 1961 but it is now. Further, the charterers appeared generally when counsel argued against the motion to restore as here inabove explained. This misinterpretation of petitioner's request for relief was error.

Then the court continues: "If Zack is precluded from substituting International for the SS Severn River, (destroyed in 1969), restoration becomes meaningless." Accordingly, the court proceeds to hold that the substitution was impossible and so it erred not only in the method it followed to come to that con-

clusion, but also in cutting out of its further consideration petitioner's request to restore the case as against the charterers as well as the shipowner. The charterers have not paid the judgment and petitioner is not precluded from prosecuting this suit against it; see Goodrich on Conflict of Laws, 3rd edition, which says at chapter 15, at the bottom of p. 631:

> "It is not the judgment, but the satisfaction of it that renders it a bar to a recovery in a domestic suit upon the original cause of action."

See also Ehrenzweig, Conflict of Laws, Part One, pp. 213-214 and cases cited in Note 7. See also Eastern Township Bank v. Beebe, 53 VT. 177 and Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.ed. 95.

As the dismissal in Germany as to International, was based on an interpretation of a local Statute of Limitations, such a dismissal cannot bar this prosecution of the suit, see Restatement of the Law, 2nd ed., Conflict of

Laws, Section 110 and Warner v. Buffalo Dry Dock, 267 F.(2) 540; and Bournais v. Atlantic Maritime Co., 220 F.(2) 152.

Besides, the reduced jdugment resulted from a misconstruction of the per package limitation of Cogsa by the German appeal court. The $33,000 allowed would cover 66 coils whereas there were 93 coils in the shipment. The limitation is applied to the whole shipment of 93 coils and not to 66 coils which the court felt were damaged. There are no facts that could support that only 66 coils were damaged. Plaintiff's proof was that all coils suffered some damage, anyway. Besides, the steel travelled as bulk cargo and freight was paid upon the gross weight of the cargo. If the freight unit limitations were applied, then the limitation would be meaningless because it would be greater than the actual damages of just short of $80,000. The refusal of the district court to recognize the right of the petitioner to proceed

in the Admiralty court because of its equitable jurisdiction was restrictive, not liberal.

The district court progressed to a holding that the limitation of Rule 15(c) dictated a denial that the filing of the libels in the Admiralty courts of New York and New Jersey defeated the right of a time-bar upon a distinction that did not exist. It interpreted the holdings in the Internatio-Rotterdam Inc., UNRRA v. Mormacmail and Ore S/S Co., cases, supra, without any support in Cogsa's wording for the distinctions which it said applied. In fact, it ignored the plain consequences that would follow upon the words "unless suit is brought etc., ". It overlooked the legal effect on the defeat of Cogsa's time-bar by the filing of a suit against the owner in Germany. It went on to refine the wording of Rule 15(c) not equitably, in favor of justice, to get to a trial on the merits of the dispute, but to defeat the valid action without a trial.

Denying to Admiralty its powers to do justice according to the facts of the case is to deny due process to a litigant in Admiralty.

There being no Statutory bar effective, and this being a purely maritime cause of action, the rule of laches applied in respect of the restoration. Benedict on Admiralty, Section 462 states:

> "Unless an Act of Congress specifies a fixed time for commencement of an action * * * or taking other steps in an Admiralty suit, all matters of delay are left to the discretion of the district court sitting in Admiralty * * * . But in general, the district court sitting in Admiralty judges each case whether in view of the circumstances the demand is so stale as to be deemed neglected or abandoned, in accordance with the equitable doc-

trine of Laches."

Section 122, Corpus Juris Secundum, Admiralty, states of the elements of Laches:

> "Important constituent elements of Laches in Admiralty are unreasonable delay by one party in assertion of his remedy and prejudice to another as a result of the delay."

Delay alone is not sufficient to support a claim of Laches, says Corpus Juris Secondum at Section 123. See Hill v. Brune, 498 F.(2) 565, 568 and Lovrich v. Warner Co., 118 F.(2) 690. At Section 124, Corpus Juris Secundum states that prejudice to the other side must be shown by reason of the delay. Here, no lack of diligence in the prosecution of its case and no prejudice to its defense are claimed by defendants. 2 Am. Jur., 2nd ed., Admirlty, Section 190 restates this rule for the application of laches in Admiralty.

The rule of laches in Admiralty was recognized by this court, see Czaplicki v. The

Hoegh Silvercloud, 351 U.S. 525; The Key City, 14 Wall. 653; So. Pacific Co. v. Bogart, 250 U.S. 483. In United States v. Western, 352 U.S. 52, this court said that lapse of time is not a criteria, "If this litigation is not stale, then no issue in it can be said to be stale."

However looked at, the courts below erred so effectively that petitioner lost its case without a chance of being heard on the merits, by a misapplication of the rules to deny the equitable practices of our Admiralty courts. The particular point of Cogsa's time-bar is important, for its own sake, and to attain uniformity between the decision below and those of the Second and Fourth Circuits. The decision is not in the interest of justice. In fact, justice would demand its correction. It would therefor be appropriate for this court to exercise its power of review sitting in Admiralty, to correct this ambiguous decision. The fact that petitioner has been deprived of

of due process as is available normally to litigants in our Admiralty court also ought to lend its weight in favor of a review by this court. The attack upon our Admiralty court's power to exercise its traditional equitable powers by this decision of the courts below, requires upholding the jurisdiction of Admiralty, as has been held by this court; see Swift Company Packers et al, v. Compania Columbiana Del Carribe S.A., et al, 339 U.S. 684.

WHEREFORE this honorable court is respectfully urged to grant its writ to the court of Appeals, Third Circuit, to review the judgment and decision below.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2207

M. W. ZACK METAL COMPANY, Appellant

v.

THE SS SEVERN RIVER, JANSEN & CO., CONTAM LINIE and HANS H. JANSEN

(D. C. CIVIL NO. 386-61, D. of N. J.)

Submitted Under Third Circuit Rule 12(6)
May 1, 1978
Before SEITZ, Chief Judge, VAN DUSEN and ROSENN, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

Seitz
Chief Judge

Attest:

DATED: May 2, 1978 Thomas F. Quinn, Clerk

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

M.W. ZACK METAL COMPANY,)
Libellant,)
v.) Civil Action No. 386-61
THE SS SEVERN RIVER, JANSEN & CO.,) OPINION
CONTAM LINIE and HANS H. JANSEN,)
Respondents.)

Appearances:

Mr. Charles P. Saling
Attorney for libellant
By: Mr. Anthony B. Cataldo (New York bar)

Messrs. Lum, Biunno & Tompkins
Attorneys for respondents
By: Mr. David A. Birch

COOLAHAN, Senior Judge

This matter comes before the Court on a motion by plaintiff, M.W. Zack Metal Company, to vacate an order of dismissal entered in the instant admiralty action[1] and to permit an amendment of its complaint substituting[2] a party against whom the claim is asserted.[3]

In 1960 International Navigation Corporation chartered its vessel SS Severn River to Contam Linie (the charterer), a

[1] Pursuant to Fed. R. Civ. P. 60(b)(5).

[2] Plaintiff seeks to substitute the owner of a vessel as a named defendant in place of the vessel itself.

[3] Pursuant to Fed. R. Civ. P. 15(a), 15(c).

German partnership (including Jansen & Co. and Hans H. Jansen), for a voyage from Antwerp, Belgium, to the Port of New York. The charterer solicited cargo to be transported on board the Severn River, and Zack shipped with the charterer 93 coils of hot rolled steel for which a clean bill of lading was issued but which were found to be damaged when they were discharged in Jersey City in February, 1960.

A libel was filed in this court[4] on May 12, 1961,[5] by Zack against the SS Severn River, Contam Linie, Jansen & Co., and

[4] Pursuant to 46 U.S.C. § 740, which provides the federal courts with admiralty and maritime jurisdiction, and 46 U.S.C. §§ 1300, et seq., pertaining to bills of lading in conjunction with the carriage of goods by sea in foreign trade, to or from ports of the United States.

[5] The Court notes at this time the history of litigation concerning these parties in various courts of law. Zack Metal Company instituted a suit alleging the same cause of action as herein in the Southern District of New York on February 11, 1961, which was subsequently dismissed for lack of prosecution. In May, 1961, it instituted a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners of the charterer, and International Navigation Corporation. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel, but Zack's claim against International was postponed for later decision. In 1971 the German court rendered a decision against International. All parties, including Zack, appealed to a higher German court. In 1972, while the appeal was pending, Zack commenced suit in the Eastern District of Virginia and caused an attachment to issue against another vessel owned by International. The District Court dismissed the action and the Court of Appeals for the Fourth Circuit affirmed. M.W. Zack Metal Co. v. International Navigation Corp., 510 F.2d 451 (4th Cir. 1975). The court held that the trial court judgment in Germany was an in rem judgment against the SS Severn River which furnished no basis for the assertion of in personam liability on the owner, or the attachment of another vessel owned by International.

Also in 1975, the Hanseatic Provincial Court of Appeals in Germany dismissed the action with respect to International and affirmed the judgments against the other defendants, but in reduced amounts. Plaintiff petitioned the Supreme Court for review of the Fourth Circuit holding on the ground that the Circuit Court had lost jurisdiction to interpret the 1971 German judgment when the German Appeals Court reversed and dismissed the action with respect to International. Certiorari was, however, denied. 422 U.S. 1010 (1975).

Hans H. Jansen for the damaged cargo. The action was dismissed administratively on March 6, 1964, for lack of prosecution, pursuant to General Rule 12, the predecessor to General Rule 30. Upon Zack's application, an order was entered on March 12, 1965, restoring the case to the court's docket for the purpose of arresting the SS Severn River. A monition was issued on that date, but was returned unserved. A second order dismissing the suit administratively for lack of prosecution pursuant to General Rule 12 was then entered on March 24, 1965, without prejudice to the right of plaintiff to reopen the proceedings for good cause shown. Plaintiff seeks to vacate the March 24, 1965, order of dismissal and to amend its complaint.

Fed. R. Civ. P. 60(b)(5) provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) ... it is no longer equitable that the judgment should have prospective application."

Relief under Rule 60(b) is a matter addressed to the discretion of the court. Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82 (W.D. Pa. 1972), affirmed without opinion, 474 F.2d 1340 (3d Cir. 1973); Wagner v. Pennsylvania R.R. Co., 282 F.2d 392 (3d Cir. 1960); Delzona Corp. v. Sacks, 265 F.2d 157 (3d Cir. 1959); Toozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). Plaintiff requests the Court to exercise its discretion and restore this case to the docket so that it might have an adjudication on the merits of its claim for damage with respect to International Navigation Corporation. Plaintiff suggests that laches is the only element appropriate for consideration when examining the issue whether the case should be restored, and that since it has been "diligently" prosecuting its claim in Germany,

restoration should be permitted.

International argues against restoration on the basis that the March 24, 1965, order of dismissal has no prospective effect and therefore the discretionary relief afforded by Rule 60(b)(5) is unavailable. It further contends that restoration of the instant proceeding would be an abuse of the Court's discretion since plaintiff "now having lost, on appeal, its first bite of the apple, ... seeks, by reopening this suit, to take a second bite."[6]

It is unnecessary for the Court to reach the merits of the conflicting positions as to whether it should in the exercise of its discretion vacate its previous order. Plaintiff's exclusive purpose in bringing this motion is to receive an adjudication on its claim for damage with respect to International. If Zack is precluded from substituting International for the SS Severn River (destroyed in 1969), restoration becomes meaningless. A determination whether the complaint may properly be amended is thus in a practical sense dispositive of the restoration issue.

Plaintiff seeks leave of the Court to amend its libel by substituting International Navigation Corporation of Monrovia, Liberia, as owner of the SS Severn River, in place of the SS Severn River as a party defendant. The issue for the Court's determination is whether the complaint may now be amended so as to assert the claim therein against the vessel's owner without violating the rule expressed in Fed. R. Civ. P. 15(c) against adding new parties

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[6] Memorandum of law on behalf of International Navigation Corporation in opposition to plaintiff's motion to vacate dismissal and amend complaint, p. 3.

to an action after the expiration of the statute of limitations.

The first paragraph of Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining a defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

This action is brought before the Court pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, et seq., which contains its own limitations period. 46 U.S.C. § 1303(6) states in part:

> "In any event, the carrier and the ship shall be discharged from all liability in respect to loss or damage unless suit is brought within one year after delivery of the goods or the date when goods should have been delivered."

Thus, for purposes of examining whether the facts of the instant suit are sufficient to bring this motion within the requirements of Fed. R. Civ. P. 15(c), the Cogsa one-year limitation period will be applied.

Suit herein was commenced in 1961 against the SS Severn River, and also against the charterers, Jansen and Co., Contam Linie, and Hans H. Jansen. Plaintiff now seeks by way of amendment to substitute an in personam claim against International Navigation Corporation as owner of the SS Severn River for the initial in rem claim against the vessel itself. Plaintiff contends that it is entitled to such an amendment as a matter of

course. While the thrust of Rule 15 as a whole is to allow the liberal use of amendments to implement the important federal policy of encouraging litigation on the merits,[7] Rule 15(c) imposes the necessary restrictions in deference to the equally important premises of the statute of limitations,[8] with which relation back is in the terms of the Federal Rules Advisory Committee "intimately connected."[9] Rule 15(c) determines whether an amendment that changes parties after the expiration of the statute of limitations relates back to the time of filing of the original complaint. "It should be read together with the general provision in Rule 15(a) that leave to amend should be freely given when justice so requires." Yorden v. Flaste, 374 F. Supp. 516, 518-19 (D. Del. 1974).

Although courts do not agree on whether the terminology "changing the party" found in Rule 15(c) encompasses the addition or substitution of parties, this Court will assume that addition or substitution is possible and will proceed to test the plaintiff's proposed amendment against the explicit requirements of Rule 15(c). Those courts which prohibit joinder of new parties (see People of Living God v. Star Towing Co., 289 F. Supp. 635 (E.D. La. 1968)) apply a restrictive construction to the Rule 15(c) reference to an amendment changing a party. The Advisory Committee's Note, however, seems to reject this restrictive construction.

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[7] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[8] 57 Minn. L. Rev. 83, 87 (1972).

[9] Fed. R. Civ. P. 15(c) Advisory Committee's Note.

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The stated purpose of Rule 15(c) is to clarify when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall relate back to the date of the original pleading. Fed. R. Civ. P. 15(c) Advisory Committee's Note, 39 F.R.D. at 82. Proper interpretation of the phrase "changing the party" should therefore include the addition and substitution of a party as well as misnomer situations.

Rule 15(c) provides three conditions which must be satisfied in order for an amendment changing a party to relate back: (1) the claim asserted in the amended pleading must arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; (2) the party to be brought in by amendment must have, within the period provided by law for commencing the action against him, received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) the party to be brought in must or should, within the period of time provided by law for commencing the action against him, have known that but for a mistake concerning the identity of the proper party the action would have been brought against him.

Since plaintiff seeks only to substitute a defendant against whom its claim is asserted, the first condition of Rule 15(c) is clearly satisfied. The second condition, however, does not seem to have been met. For plaintiff to satisfy that condition, it must make a two-fold showing: (a) that International

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Navigation Corporation had notice of the institution of this action[10] before the statute of limitations had run, and (b) that such notice was sufficient to prevent International from being prejudiced in maintaining its defense on the merits. Without reaching the question of prejudice, there is nothing in the record to indicate that International received even informal notice of the institution of this lawsuit prior to the attempted arrest of the SS Severn River in March, 1965, several years after the Cogsa one-year limitation period had expired.

Regardless of whether plaintiff can surmount the second condition of Rule 15(c), the third requirement cannot be met. The third condition of the rule necessitates a showing that the party to be brought in by amendment must or should within the period of time for commencing the action against it have known that but for a mistake concerning the identity of the proper party, the action would have been brought against it. There is not in this case, nor could there be, any allegation that the original naming of the ship (SS Severn River) as a defendant was a mistake within

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[10] Although the Advisory Committee suggested that the purpose of the 1966 amendment to Rule 15 was the clarification of those instances in which relation back was appropriate, there still exist certain uncertainties in Rule 15(c) as amended. The uncertainty stems from the construction given to the language of the rule itself. (See discussion "changing the party.") Possible conflict exists with respect to how the phrase "notice of the institution of the action" should be construed. Two Courts of Appeals have expressly held that this language means notice of a lawsuit and not merely notice of the incident which led to the suit. Craig v. United States, 413 F.2d 854 (9th Cir.), cert. den., 396 U.S. 987 (1969); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973). Within the Third Circuit, two District Courts have affirmed the position adopted in Craig. Slack v. Treadway Inn of Lake Harmony, Inc., 388 F. Supp. 15 (M.D. Pa. 1974); Francis v. Pan American Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975). This Court also adopts the position announced in Craig. The notice requirement applicable to plaintiff's motion is thus notice of the commencement of the instant suit.

Rule 15(c)(2).

Admiralty has long recognized the "personality" of the ship as distinct from the owner, and has traditionally distinguished between actions in rem brought against a vessel itself, and proceedings in personam directed against a vessel's owner or charterer. The Supreme Court alluded to the difference between the two causes of action when it commented that it is "a long standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." Continental Grain v. Barge FBL-585, 364 U.S. 19, 22 (1960). This Court refuses to accept plaintiff's contention that there exists no difference between an in rem and an in personam cause of action. One not only may, but must, distinguish between in rem and in personam actions. Gilmore & Black, The Law of Admiralty 2d (1975) §§ 1-12, p. 37. Our own Circuit Court of Appeals has indicated that the distinction between in rem and in personam proceedings is "fundamental." The Chickie, 141 F.2d 80, 86 (3d Cir. 1944). The court noted that an action in rem directs a plaintiff's claim to a thing, the vessel itself. A successful judgment in an in rem action was said to affect persons, but only with respect to "their interest in the thing which is personified as a defendant in the litigation." Id.

An action in rem may be initiated concurrently with or as an alternative to a proceeding in personam. If as in Continental Grain, supra, an admiralty libel has been brought against a vessel in rem and an in personam libel has been instituted against the vessel owner, the practical effect is the bringing of a single civil action with two inseparable parts against the vessel owner. Construction Aggregates Corp. v.

S.S. Azalea City, 399 F. Supp. 662 (D. N.J. 1975).

Here, however, plaintiff initially instituted suit in rem against the SS Severn River and now, 15 years later, seeks to bring that claim against International Navigation Corporation in personam. Although it is true, as plaintiff urges, that the courts have consistently held that instituting or filing suit constitutes the bringing of suit within one year as required by the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(6), irrespective of the time when process is issued, United Nations Relief and R. Adm. v. The Mormacmail, 99 F. Supp. 552, 554 (S.D. N.Y. 1951); Ore Steamship Corp. v. D/S/A/S Hassel, 137 F.2d 326, 329 (2d Cir. 1943); Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1954), the cases so stating involve factual circumstances easily distinguished from those in the instant action. The Fourth Circuit Court of Appeals stated in Internatio-Rotterdam, supra, that the filing of suit in admiralty begins the litigation as far as the statute of limitations is concerned. Suit therein was commenced by the filing of a libel in rem and a libel in personam. Internatio-Rotterdam, Inc. v. The Karachi, 122 F. Supp. 37 (D. Md. 1954). The Circuit Court made no determination whether commencement of a suit in rem is the equivalent of commencement of suit within the meaning of Cogsa with respect to a later amendment changing the action into a proceeding in personam. The Carriage of Goods by Sea Act has not eroded the long-standing admiralty tradition of distinguishing between an action in personam and one in rem. This Court finds, therefore, that based upon the factual circumstances presented, the commencement of suit against a vessel in rem is not the commencement of suit within the Cogsa statute of limitations with

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respect to a later proposed amendment which aims to assert the same claim against the vessel's owner.

Plaintiff's claim against International Navigation Corporation as owner of the vessel is barred by the Cogsa one-year statute of limitation unless the proposed amendment is found to relate back to the date of filing of the original complaint. The facts of the instant suit indicate that the relief afforded by Fed. R. Civ. P. 15(c) is not available to plaintiff Zack Metal Co. Plaintiff has failed to satisfy the second and third requirements of Rule 15(c), and the motion to amend the complaint is therefore denied.

As previously indicated, resolution of the issue of an amendment to plaintiff's complaint is dispositive of the question of restoration. Plaintiff's motion for an order vacating the Court's March 24, 1965, order of dismissal is therefore denied.

Counsel shall submit an order in conformity with this opinion.

APPENDIX C

DECISIONS OF JULY 14, 1977, DENYING RELIEF ON RE-ARGUMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

M.W. ZACK METAL COMPANY,)
Libellant,)
v.) Civil Action No. 386-61
THE SS SEVERN RIVER, et al.,)
Respondents.) ORDER

Plaintiff has moved for reargument under Rule 12(I) of the Court's denial of plaintiff's motion to vacate the dismissal of the within action and to amend the complaint. After a complete review of the record,

It is, on this 14th day of July, 1977, ORDERED that the Court's opinion of October 19, 1976, is affirmed and plaintiff's application for relief is denied.

JAMES A. COOLAHAN
U.S. Senior District Judge

APPENDIX D
DECISION AND ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
DATED JANUARY 16, 1975

(SAME TITLE)

Appeal from the United States District Court for the Easter District of Virginia, at Norfolk. Richard B. Kellam, Rudge.

Argued December 5, 1974 Decided January 16, 1975.

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and THOMSEN, Senior District Judge.

ANTHONY B. CATALDO (Jett, Berkley, Furr and Heilig on brief) for Appellant; John W. Winston (Seawell, McCoy, Winston and Dalton on brief) for Appellee.

THOMSON, Senior District Judge

M.W. Zack Metal Company (Zack) appeals from an order of the district court dismissing an action filed therein by Zack against International Navigation Corporation, a Liberian corporation (International). Zack had designated its action as an admiralty and maritime claim within the meaning of Rule 9(h), F.R. Civ. P., and caused the vessel

Virtus, owned by International, to be attached.

International chartered its vessel Severn River to Contam Linie Hansen (the Charterer), a German partnership, for a voyage in 1960 from Antwerp, Belgium, to New York. The charterer solicited cargo to be transported on board the Severn River and issued its bills of lading for such cargo signed by the vessel's master. Zack shipped with the charteter 93 coils of hot-rolled steel, for which a clean bill of lading was issued, but which were found to be damaged when they were discharged in New York.

In 1961 Zack instituted a suit in a court in Hamburg, Germany where the charterer resided, against the charterer, the individual partners of the charterer, and International. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel and entered a money judgment for the full amount of the damage in favor of Zack against

the charterer and its partners. Zack's claim against International was postponed for later decision.

In 1971 the German court rendered a further decision holding according to the agreed translation, that "personal liability of the ship's owner does not exist", but that the "claims because of cargo damages are secured through a ship's creditor's right, even if--as in the present case--the carrier is not at the same time the ship's owner". The court entered a jdugment that International "is convicted to submit to execution being levied on the S.S. Severn River" of US $64,018.83, plus interest and part of Zack's expenses. The affidavits of German lawyers submitted by Zack and International respectively, as well as the agreed translation of the judgment itself show that the judgment was essentially a judgment in rem against the Severn River. All of the parties, including Zack, appealed to a higher German court, which under German prac-

tice may take additional testimony and review both the facts and the law.

In early 1972 Zack learned that another vessel owned by International, the Virtus, was to arrive at Norfolk. Although the appellate proceedings in Germany were and are still pending, Zack commenced the present suit against International in the Eastern District of Virginia, and cause an attachment to be issued against the Virtus. International appeared specially and moved to quash the attachment and dismiss the suit. The Virtus was released after International agreed to post security. After two hearings, the district court dismissed the suit, with a full opinion.

Zack has declared on the German judgment (indeed, it could not have declared on the original maritime claim for damaged cargo because of COGSA's statute of limitations.[1] There is thus a substantial question whether the initial maritime claim has been merged in the German judgment and the present action is

1. 46 USC §1303(6) (1970).

a civil action on a debt, without the jurisdiction of Admiralty.[2] We need not decide the jurisdictional question, however, for even if there were jurisdiction in Admiralty, the German judgment) which furnishes no basis for an in personam claim against the owner or for the attachment of the Virtus.

The judgment of the trial court in Hamburg is under review on appeal. It may be that the appellate court will impose some other liability upon the owner, but it is plain that the trial court limited the onwer's liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no personam liability upon its owner. (Since Zack may not now declare upon the original maritime claim and the only cause of action it may presently assert is subject to the substantive limitations of the unreviewed judgment of the German trial court, there is),

2. Cf. Restatement Judgments §47: Restatement, Second, Judgments Tentative Draft No. 1 March 28, 1973, §47. The restatement rule is based upon cases influenced by the full faith and credit clause of the Constitution, not applicable here.

and furnishing no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against the owner than the trial court did.

The German judgment did not justify the suit in the Eastern District of Virginia or the attachment of the Virtus. The decision of the district judge dismissing that suit will be AFFIRMED.

In the Supreme Court of the United States
October Term, 1978

No. 78-174

M. W. ZACK METAL COMPANY, Petitioner,

v.

SS SEVERN RIVER, JANSEN & CO.,
CONTAM LINIE, and HANS H. JANSEN, respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

APPENDICES B and E

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APPENDIX B

DECISION OF OCTOBER 19, 1976, DENYING MOTION

Not for Publication

UNITED STATES DISTRICT COUR
DISTRICT OF NEW JERSEY

M. W. ZACK METAL COMPANY,)

Libellant,)

v.

THE SS SEVERN RIVER, JANSEN & CO.,)
CONTAM LINIE and HANS H. JANSEN,) Civil Action
) No. 386-61
Respondents.
) OPINION

Appearances:

Mr. Charles P. Saling
Attorney for libellant
By: Mr. Anthony B. Cataldo (New York bar)

Messrs: Lum, Biunno & Tompkins
Attorneys for respondents
By: Mr. David A. Birch

COOLAHAN, Senior Judge

This matter comes before the court on a motion by plaintiff, M.W. Zack Metal Company, to vacate an order of dismissal entered in the instant admiralty action[1] and to permit an

[1] Pursuant to Fed. R. Civ. P. 60(b)(5).

amendment of its complaint substituting[2] a party against whom the claim is asserted.[3]

In 1960 International Navigation corporation chartered its vessel SS Severn River to Contam Linie (the charterer), a German Partnership (including Jansen & Co. and Hans H. Jansen), for a voyage from Antwerp, Belgium, to the port of New York. The charterer solicited cargo to be transported on Board the Severn River, and Zack shipped with the Charterer 93 coils of hot rolled steel for which a clean bill of lading was issued but which were found to be damaged when they were discharged in Jersey City in February, 1960.[4]

A libel was filind in this court on May 12, 1961,[5] by Zack against the SS Severn River, Contam Linie, Jansen & Co., and Hans H. Jansen for the damaged cargo. The action was

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[2]Plaintiff seeks to substitute the owner of a vessel as a named defendant in place of the vessel itself.

[3]Pursuant to Fed. R. Civ. P. 15(a), 15(c).

[4]PURSUANT TO 46 U.S.C. § 740, which provides the federal courts with admiralty and maritime jurisdiction, and 46 U.S.C. §§ 1300, et seq., pertaining to bills of lading in conjunction with the carriage of goods by sea in foreign trade, to or from ports of the United States.

[5]The Court notes at this time the history of litigation concerning these parties in various courts of law. Zack Metal Company instituted a suit alleging the same cause of action as herein in the Southern District of New York on February 11, 1961, which was subsequently dismissed for lack of prosecution. In May, 1961, it instituted a

DECISION OF OCTOBER 19, 1976, DENYING MOTION

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5 a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners of the charterer, and International Navigation Corporation. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel, but Zack's claim against International was postponed for later decision. In 1971 the German court rendered a decision against International. All parties, including Zack, appealed to a higher German court. In 1972, while the appeal was pending, Zack commenced suit in the Eastern District of Virginia and caused an attachment to issue against another vessel owned by international. The District Court dismissed the action and the Court of Appeals for the Fourth Circuit affirmed. M.W. Zack Metal Co. v. International Navigation Corp., 510 F.2d 451 (4th Cir. 1975). The court held that the trial court judgment in Germany was an in rem judgment against the SS Severn River which furnished no basis for the assertion of in personam liability on the owner, or the attachment of another vessel owned by International

Also in 1975, the Hanseatic Provincial Court of Appeals in Germany dismissed the action with respect to International and affirmed the judgments against the other defendant, but in reduced amounts. Plaintiff petitioned the Supreme Court for review of the Fourth Circuit holding on the ground that the Circuit Court had lost jurisdiction to interpret the 1971 German judgment when the German Appeals Court reversed and dismissed the action with respect to International. Certiorari was, however, denied. 422 U.S. 1010 (1975).

OPINION OF OCTOBER 19, 1976

dismissed administratively on March 6, 1964, for lack of prosecuiton, pursuant to General Rule 12, the predecessor to General Rule 30. Upon Zack's application, an order was entered on March 12, 1965, restoring the case to the court's docket for the purpose of arresting the SS Severn River. A monition was issued on that date, but was returned unserved. A second order dismissing the suit administratively for lack of prosecution pursuant to General Rule 12 was then entered on March 24, 1965, without prejudice to the right of plaintiff to reopen the proceedings for good cause shown. Plaintiff seeks to vacate the March 24, 1965, order of dismissal and to amend its complaint.

Fed. R. Civ. P. 60(b)(5) provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...(5)... it is no longer equitable that the judgment should have prospective application."

Relief under 60(b) is a matter addressed to the discretion of the court. Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82 (W.D. Pa. 1972), affirmed without opinion, 474 F.2d 1340 (3d Cir. 1973); Wagner v. Pennsylvania R.R. Co., 282 F.2d 157 (3d Cir. 1959); Toozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). Plaintiff requests the Court to exercise its discretion and restore this case to the docket so that it might have an adjucation on the merits of its claim for damage with respect to International Naviga-

gation Corporation. Plaintiff suggests that laches is the only element appropriate for consideration when examining the issue whether the case should be restored, and that since it has been "diligently" prosecuting its claim in Germany, restoration should be permitted.

International argues against restoration on the basis that the March 24, 1965, order of dismissal has no prospective effect and therefore the discretionary relief afforded by Rule 60(b)(5) is unavailable. It further contends that restoration of the instant proceeding would be an abuse of the Court's discretion since plaintiff "now having lost, on appeal, its first bite of the apple, ... seeks, by reopening this suit, to take a second bite."[6]

It is unnecessary for the Court to reach the merits of the conflicting positions as to whether it should in the exercise of its discretion vacate its previous order. Plaintiff's exclusive purposed in bringing this motion is to receive an adjudication on its claim for damage with respect to International. If Zack is precluded from substituting International for the SS Severn River (destroyed in 1969), restoration becomes meaningless. A determination whether the complaint may properly be amended is thus in a practical sense dispositive of the restoration issue.

Plaintiff seeks leave of the Court to amend its libel by substituting International Navigation Corporation of Monrovia, Liberia, as owner of the SS Severn River, in place of the SS Severn River as a party defendant. The issue for the Court's determination is whether the complaint may now be amended so as to assert the claim therein against the vessel's owner without violating the rule expressed in Fed. R.

[6]Memorandum of law on behalf of International Navigation Corporation in opposition to plaintiff's motion to vacate dismissal and amend complaint, p.3

Civ. P. 15(c) against adding new parties to an action after the expiration of the statute of limitations.

The first paragraph of Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has recieved such notice of the institution of the action that he will not be prejudiced in maintaining a defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

This action is brought before the Court pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, et seq., which contains its own limitations period. 46 U.S.C. § 1303(6) states in part:

> "In any event, the carrier and the ship shall be discharged from all liability in respect to loss or damage unless suit is brought within one year after delivery of the goods or the date when goods should have been delivered."

Thus, for purposes of examining whether the

facts of the instant suit are sufficient to bring this motion within the requirements of Fed. R. Civ. P. 15(c), the Cogsa one-year limitation period will be applied.

Suit herein was commenced in 1961 against the SS Severn River, and also against the charterers, Jansen and Co., Contam Linie, and Hans H. Jansen. Plaintiff now seeks by way of amendment to substitute an in personam claim against International Navigation Corporation as owner of the SS Severn River for the initial in rem claim against the vessel itself. Plaintiff contends that it is entitled to such an amendment as a matter of course. While the thrust of Rule 15 as a whole is to allow the liberal use of amendments to implement the important federal policy of encouraging litigation on the merits,[7] Rule 15(c) imposes the necessary restrictions in deference to the equally important premises of the statute of limitations,[8] with which relation back is in the terms of the Federal Rules Advisory Committee "intimately connected."[9] Rule 15(c) determines whether an amendment that changes parties after the expiration of the statute of limitations relates back to the time of filing of the original complaint. "It should be read together with the general provision in Rule 15(a) that leave to amend should be freely given when justice so requires." Yordan v. Flaste, 374 F. Supp. 516, 518-19 (D. Del. 1974).

Although courts do not agree on whether the terminology "changing the party" found in Rule 15(c) encompasses the addition or substitution of parties, this court will assume that

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[7] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[8] 57 Minn. L. Rev. 83, 87 (1972).

[9] Fed. R. Civ. P. 15(c) Advisory Committee's Note.

addition or substitution is possible and will proceed to test the plaintiff's proposed amendment against the explicit requirements of Rule 15(c). Those courts which prohibit joinder of new parties (see People of Living God v. Star Towing Co., 289 F. Supp. 635 (E.D. La. 1968)) apply a restrictive construction to the Rule 15(c) reference to an amendment changing a party. The Advisory Committee's Note, however, seems to reject this restrictive constuction. The stated purpose of Rule 15(c) is to clarify when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or a misdescription of a defendant) shall relate back to the date of the original pleading. Fed. R. Civ. P. 15(c) Advisory Committee's Note, 39 F.R.D. at 82. Proper interpretation of the phrase "changing the party" should therefore include the addition and substitution of a party as well as misnomer situations.

Rule 15(c) provides three conditions which must be satisfied in order for an amendment changing a party to relate back: (1) the claim asserted in the amended pleading must arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; (2) the party to be brought in by amendment must have, within the period provided by law for commencing the action against him, received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) the party to be brought in must or should, within the period of time provided by law for commencing the action against him, have known that but for a mistake concerning the identity of the proper party the action would have been brought against him.

Since plaintiff seeks only to substitute a defendant against whom its claim is asserted

the first condition of Rule 15(c) is clearly satisfied. The second condition, however, does not seem to have been met. For plaintiff to satisfy that condition, it must make a two-fold showing: (a) that International Navigation Corporation had notice of the institution of this action[10] before the statute of limitations had run, and (b) that such notice was sufficient to prevent International from being prejudiced in maintaining its defense on the merits. Without reaching the question of prejudice, there is nothing in the record to indicate that International received even informal notice of the institution of this lawsuit prior to the attempted arrest of the SS Severn River in March, 1965, several years after the Cogsa one-year limitation period had expired.

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[10]Although the Advisory Committee suggested that purpose of the 1966 amendment to Rule 15 was the clarification of those instances in which relation back was appropriate, there still exist certain uncertainties in Rule 15(c) as amended. The uncertainty stems from the construction given to the language of the rule itself. (See discussion "changing the party.") Possible conflict exists with respect to how the phrase "notice of the institution of the action" should be construed. Two Courts of Appeals have expressly held that this language means notice of a lawsuit and not merely notice of the incident which led to the suit. Craig v. United States, 413 F.2d 854 (9th Cir.), cert. den., 396 U.S. 987 (1969); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973). Within the Third Circuit, two District Courts have affirmed the position adopted in Craig. Slack v. Treadway Inn of Lake Harmony, Inc., 388 F. Supp. 15 (M.D. Pa. 1974); Francis v. Pan American Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975). This court also adopts the position announced in Craig. The notice requirement applicable to plaintiff's motion is thus notice of the commencement of the instant suit.

Regardless of whether plaintiff can surmount the second condition of Rule 15(c), the third requirement cannot be met. The third condition of the rule necessitates a showing that the party to be brought in by amendment must or should within the period of time for commencing the action against it have known that but for a mistake concerning the identity of the proper party, the action would have been brought against it. There is not in this case, nor could there be, any allegation that the original naming of the ship (SS Severn River) as a defendant was a mistake within Rule 15(c)(2).

Admiralty has long recognized the "personality" of the ship as distinct from the owner, and has traditionally distinguished between actions in rem brought against a vessel itself, and proceedings in personam directed against a vessel's owner or charterer. The Supreme Court alluded to the difference between the two causes of action when it commented that it is "a long standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." Continental Grane v. Barge FBL-585, 364 U.S. 19, 22 (1960). This Court refuses to accept plaintiff's contention that there exists no difference between an in rem and an in personam cause of action. One not only may, but must, distinguish between in rem and in personam actions. Gilmore & Black, The Law of Admiralty 2d (1975) §§ 1-12, p. 37. Our own Circuit Court of Appeals has indicated that the distinction between in rem and in personam proceedings is "fundamental." The Chickie, 141 F.2d 80, 86 (3d Cir. 1944). The court noted that an action in rem directs a plaintiff's claim to a thing, the vessel itself. A successful judgment in an in rem action was said to affect persons, but only with respect to "their interest in the thing which is personified as a defendant in the litigation." Id.

An action in rem may be initiated concurrently with or as an alternative to a proceeding in personam. If as in Continental Grain, supra, an admiralty libel has been brought against a vessel in rem and an in personam libel has been instituted against the vessel owner, the practical effect is the bringing of a single civil action with two inseperable parts against the vessel owner. Construction Aggregates Corp. v. S.S. Azalea City, 399 F. Supp. 662 (D. N.J. 1975).

Here, however, plaintiff initially instituted suit in rem agaisnt the SS Severn River and now, 15 years later, seeks to bring the claim aginast International Navigation Corporation in personam. Although it is true, as plaintiff urges, that the courts have consistently held that instituting or filing suit constitutes the bringing of suit within one year as required by the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6), irrespective of the time when process is issued, United Nations Relief and R. Adm. v. The Mormacmail, 99 F. Supp. 552, 554 (S.D. N.Y. 1951); Ore Steamship Corp. v. D/S/A/S Hassel, 137 F.2d 326, 329 (2d Cir. 1943); Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1954), the cases so stating involve factual circumstances easily distinguished from those in the instant action. The Fourth Circuit Court of Appeals stated in Internatio-Rotterdam, supra, that the filing of suit in admiralty begins the litigation as far as the statute of limitation is concerned. Suit therein was commenced by the filing of a libel in rem and a libel in personam. Internatio-Rotterdam, Inc. v. the Karachi, 122 F. Supp. 37 (D. Md. 1954). The Circuit Court made no determination whether commencement of a suit in rem is the equivalent of commencement of suit within the meaning of Cogsa with respect to a later amendment changing the action into a proceeding in personam. The Carriage of Goods by Sea Act has not eroded the

long-standing admiralty tradition of distinguishing between an action in personam and one in rem. This Court finds, therefore, that based upon the factual circumstances presented the commencement of suit against a vessel in rem is not the commencement of suit within the Cogsa statute of limitations with respect to a later proposed amendment which aims to assert the same claim against the vessel's owner.

Plaintiff's claim against International Navigation Corporation as owner of the vessel is barred by the Cogsa one-year statute of limitation unless the proposed amendment is found to relate back to the date of filing of the original complaint. The facts of the instant suit indicate that the relief afforded by Fed. R. Civ. P. 15(c) is not available to plaintiff Zack Metal Co. Plaintiff has failed to safisfy the second and third requirements of Rule 15(c), and the motion to amend the complaint is therefore denied.

As previously indicated, resoluiton of the issue of an amendment to plaintiff's complaint is dispositive of the question of restoration. Plaintiff's motion for an order vacating the Court's March 24, 1965, order of dismissal is therefore denied. Counsel shall submit an order in conformity with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1544

M. W. ZACK METAL COMPANY

Appellant

v.

INTERNATIONAL NAVIGATION CORPORATION

Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Judge.

Argued December 5, 1974 Decided March 10, 1975.

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and THOMSEN, Senior District Judge.

Anthony B. Cataldo (Jett, Berkley, Furr and Heilig on brief) for Appellant; John W. Winston (Seawell, McCoy, Winston and Dalton on brief) for Appellee.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

M.W. ZACK METAL COMPANY :

v. : No. 74-1544

INTERNATIONAL NAVIGATION CORPORATION :

- O R D E R -

Upon consideration of the Petition for Rehearing, it is now ORDERED:

(1) that the opinion be modified to conform to the copy attached to this Order, and

(2) that the Petition be and it hereby is denied.

With concurrences of Judges Haynsworth and Butzner.

Roszel C. Thomsen
Senior U. S. District Judg

March , 1975.

THOMSEN, Senior District Judge

M. W. Zack Metal Company (Zack) appeals from an order of the district court dismissing an action filed therein by Zack against International Navigation Corporation, a Liberian corporation (International). Zack had designated its action as an admiralty and maritime claim within the meaning of Rule 9(h), F. R. Civ. P., and caused the vessel Virtus, owned by International, to be attached.

International chartered its vessel Severn River to Contam Linie Hansen (the charterer), a German partnership, for a voyage in 1960 from Antwerp, Belgium, to New York. The charterer solicited cargo to be transported on board the Severn River and issued its bills of lading for such cargo signed by the vessel's master. Zack shipped with the charterer 93 coils of hot-rolled steel, for which a clean bill of lading was issued, but which were found to be damaged when they were discharged in New York.

In 1961 Zack instituted a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners liable for the damage to Zack's steel and entered a money judgment for the full amount of the damage in favor of Zack against the charterer and its partners. Zack's claim against International was postponed for later decision.

In 1971 the German court rendered a further decision holding, according to the agreed translation, that "personal liability of the ship's owner does not exist", but that the "claims because of cargo damages are secured through a ship's creditor's right, even if - as in the present case - the carrier is not at the same time the ship's owner". The court entered a judgment that International "is convicted to

submit to execution being levies on the S. S. Severn River" of US$ 64,018.83, plus interest and part of Zack's expenses. The affidavits of German lawyers submitted by Zack and International respectively, as well as the agreed translation of the judgment itself, show that the judgment was essentially a judgment in rem against the Severn River. All of the parties, including Zack, appealed to a higher German court, which under the German practice may take additional testimony and review both the facts and the law.

In early 1972 Zack learned that another vessel owned by International, the Virtus, was to arrive at Norfolk. Although the appellate proceedings in Germany were and are still pending, Zack commenced the present suit against International in the Eastern District of Virginia, and caused an attachment to be issued against the Virtus. International appeared specially and moved to quash the attachment and dismiss the suit. The Virtus was released after International agreed to post security. After two hearings, the district court dismissed the suit, with a full opinion.

Zack has declared on the German judgment, which furnishes no basis for an in personam claim against the owner or for the attachment of the Virtus.

The judgment of the trial court in Hamburg is under review on appeal. It may be that the appellate court will impose some other liability upon the owner, but it is plain that the trial court limited the owner's liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability upon its owner, and furnishing no basis for the assertion of an in personam

liability of the owner or the attachment of any vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against the owner than the trial court did.

The German judgment did not justify the suit in the Eastern District of Virginia or the attachment of the Virtus. The decision of the district judge dismissing that suit will be affirmed.

We have treated the cause of action being founded solely on the German judgment. Nothing we have done or said should be construed as intimating any opinion upon any cause of action Zack may have against any person, firm or corporation, including International, under the Carriage of Goods by Sea Act, 46 U.S.C. 1300 et seq.

Affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-174

N.W. ZACK METAL COMPANY,

Petitioner,

vs.

S.S. SEVERN RIVER, JANSEN & CO.,
CONTAM LINIE, and HANS H. JANSEN,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-174

N.W. ZACK METAL COMPANY,
Petitioner,

vs.

S.S. SEVERN RIVER, JANSEN & CO., CONTAM LINIE, and HANS H. JANSEN,
Respondents.

Brief for Respondent in Opposition to Petition for a Writ of Certiorari

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OPINIONS BELOW

Both the opinion of the District Court and its Order upon petitioner's Motion for Reargument were unreported, but are included in Appendices B and C of the Petition for Certiorari. The Judgment Order of the United States Court of Appeals for the Third Circuit was also not reported and is included in the Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner's Brief misstates the nature of the legal issue, or issues, sought to be reviewed. The only real issue before this Court is whether the United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter. The only other possible issue before this Court is whether the District Court properly refused to vacate the previous order of dismissal and reopen the case and restore it as an active matter pursuant to Fed. R. Civ. P. 60(b)(5).

STATUTES INVOLVED

The only federal statute applicable to this case is 46 U.S.C. 1303(6).

STATEMENT OF THE CASE

The procedural history of this litigation and of the other suits based on the same cause of action are set forth in footnote 5 of the District Court's opinion (Appendix B to Petition). However, it should be noted at this juncture that the respondent herein, International Navigation Company of Monrovia, Liberia [hereinafter International] is not a party to this suit. Rather, International was put on notice of these proceedings at the direct request of the District Court. Having received notice, International appeared through counsel solely for the purpose of opposing the motion to reopen the case and to add it as a party defendant. International filed its brief in opposition to petitioner's appeal to the United States Court of Appeals for the Third Circuit in that same capacity. On the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, International, while still not a party to this suit, again appears for the limited purpose of arguing in opposition thereto.

ARGUMENT

Point I

There is no conflict of authority.

The District Court based its decision entirely upon Fed. R. Civ. P. 15(c) and the one year statute of limitations contained in the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6). The Petition for a Writ of Certiorari completely fails to set forth any grounds pertaining to Fed. R. Civ. P. 15(c) that meet the threshhold character of the reasons enunciated in Supreme Court Rule 19 pertaining to the considerations governing review on certiorari. The Supreme Court has recognized in the past the criteria to be applied in determining whether a particular case merits consideration. Thus, in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1954), it was stated at 349 U.S. 74:

> "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

While this Court has noted that the considerations listed in Supreme Court Rule 19 neither control nor fully measure the Court's discretion, it has been repeatedly noted that compelling grounds must exist for the Court to grant a writ. Accordingly, in *Layne & Bowler Corp. v. Western Well Works, Inc., et al.*, 261 U.S. 387, 67 L.Ed. 712, 43 S. Ct. 422 (1923), Mr. Chief Justice Taft squarely addressed this point at 261 U.S. 393:

> . . . the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

The Petition under consideration is noteworthy in its failure to allege that the interpretation given Fed. R. Civ. P. 15(c) by the District Court and the subsequent affirmance of that interpretation by the United States Court of Appeals for the Third Circuit is in conflict with a decision of any other court of appeal. The only vague claim of some type of conflict set forth by petitioner relates to a misconceived perception that certain circuit courts do not distinguish between an *in rem* and an *in personam* action (Pet., pp. 35, 36 and 39)*. The cases cited by petitioner in no way indicate any such conflict.

The case of *Construction Aggregates Corp. v. S.S. Azalea City*, 399 F. Supp. 662 (D. N.J. 1975) did not even deal with the question of the distinction between *in rem* and *in personam actions*. That case involved a defense motion to transfer to another district court. The motion was granted as the court felt the transfer to be in the interest of justice as the defendants had agreed to admit *in rem* jurisdiction of the transferee court and on several other nonmaterial grounds.

Continental Grain Co. v. Barge F.B.L., 364 U.S. 19, 4 L.Ed.2d 1540, 80 S. Ct. 1470 (1960), also cited by petitioner in support of his claim that there exists no difference between an *in rem* and an *in personam* cause of action, actually notes at 364 U.S. 22-23 that it is "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a law suit and enforcing a judgment." Moreover, that case dealt only with the distinction between *in rem* and *in personam* actions for the purposes of transferring an action from one court to a more convenient forum.

* Citations to the Petition for a Writ of Certiorari in this case are designed "Pet." followed by the page numbers.

Hamilton v. Canal Barge Company, Inc., 395 F. Supp. 978 (E.D. La. 1974) also fails to support petitioner's contention that there exists some type of conflict between the courts of appeal on this point. That case involved wrongful death claims brought against various parties including a vessel owner, a marine company which chartered the barge from its owner, and the corporation which subdemised the barge. The pertinent portion of the court's holding was that as between a vessel owner and an innocent seaman, the vessel owner who charters his vessel should be liable where circumstances justifying his liability exist. The court further pointed out that where an admiralty libel has been brought against the vessel owner and an *in rem* action against the vessel, the distinction between liability *in rem* and *in personam* becomes blurred. However, in the case *sub judice* only an *in rem* action was initially brought against the S.S. *Severn River* and now some fifteen years later, petitioner seeks to bring an *in personam* claim against International, the owner.

Norfolk Ship. & Dry. Corp. v. M/Y LaBelle Simone, 371 F. Supp. 985 (D.P.R. 1973), incorrectly cited in the Petition as appearing at 375 F. Supp. 985, is the only other case cited by petitioner in support of its position that some type of conflict exists and is totally irrelevant to the case at bar.

The only other basis for the conflict claimed by petitioner is that there exists disagreement among the courts of appeal as to whether the commencement of a suit against either an owner or the vessel itself defeats a claim of time bar under the Carriage of Goods by Sea Act as to the other (Pet., p. 35). None of the three cases cited in support of this proposition are relevant to the instant case as all dealt with instances wherein suit was initiated against parties within the statutory limitation period but process could not be served until after the statute of limitations had run.

United Nations Relief and R. Adm. v. The Mormacmail, 99 F. Supp. 552 (S.D. N.Y. 1951) held that suits brought *in rem* and *in personam* were within the one year statutory period of the Carriage of Goods by Sea Act although process was not issued and served until after the statutory period.

In *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955), the United States Court of Appeals for the Fourth Circuit similarly held that the initiation of a suit against a party constitutes a bringing of suit within the required limitation period set forth in the Carriage of Goods by Sea Act, even though process is not issued until after expiration of the period.

Finally, the case of *Ore Steamship Corp. v. D/S A/S Hassel*, 137 F.2d 326 (2d Cir. 1943) held that *in personam* and *in rem* suits were timely brought within the one year statutory period of the Carriage of Goods by Sea Act although process was not issued until after one year had run.

Thus, none of the cases cited by petitioner evidences a conflict of authority between circuits. They are clearly distinguishable from the case at bar on two grounds. Initially, all three cases involved suits in which the courts found the one-year statute of limitations of the Carriage of Goods by Sea Act inapplicable because the suits against the parties had been initiated within the one year period. No attempt was being made to add an owner as an additional defendant through an *in personam* action some 15 years after an *in rem* action had been originally filed. Secondly, to the extent the one year statutory limitation period was found to be inapplicable, all three cases involved attempts to gain service of process on a named defendant after the expiration of the one year statutory period in a suit filed within the one year period. No attempt was

made to add an additional defendant after the expiration of this one year period. None of these cases involved a determination as to whether the filing of a suit *in rem* is the equivalent of the filing of a suit *in personam* for purposes of the Carriage of Goods by Sea Act's period of limitations.

Thus, it is readily apparent that it cannot be said that the Court of Appeals decided a federal question in such a way as to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. Petitioner has therefore wholly failed to sustain its burden of establishing grounds under Supreme Court Rule 19 as to why the writ should be granted.

Point II

The decision below is clearly correct.

Although the District Court did not reach the merits as to whether or not Petitioner, pursuant to Fed. R. Civ. P. 60(b)(5), might vacate the Order of Dismissal entered previously by the District Court, it is respondent's contention that no such basis existed. It is also noteworthy that in petitioner's brief no basis is asserted as to what special and important reasons might exist pursuant to Supreme Court Rule 19 as to why a writ should be granted in regard to the District Court's failure to vacate the previous order of dismissal pursuant to Fed. R. Civ. P. 60(b)(5).

This case was originally dismissed in 1964 pursuant to General Rule 12*, the predecessor to General Rule 30, for failure to prosecute. Such dismissals are discretionary with the trial court and any motion to reopen a judgment

* The Rules of the United States District Court for the District of New Jersey.

of dismissal pursuant to Fed. R. Civ. P. 60(b) is also discretionary with the trial court. *Spering v. Texas Butadiene and Chemical Corp.*, 434 F.2d 677 (3d Cir. 1970); *Wagner v. Pennsylvania R. Co.*, 282 F.2d 392 (3d Cir. 1960). Such judgments are to be set aside only in exceptional circumstances. *F.D.I.C. v. Alker*, 234 F.2d 113, 116-17 (3d Cir. 1956). Additionally, a District Court's denial of a Fed. R. Civ. P. 60(b) motion to reopen should not be set aside unless, under the circumstances of a case, such denial is a clear abuse of discretion. *Giordano v. McCartney*, 385 F.2d 154 (3d Cir. 1967). No such showing has been made by the petitioner during the course of these proceedings.

A review of Fed. R. Civ. P. 60(b)(5) indicates that it is not applicable to this case. The Petitioner originally moved under Fed. R. Civ. P. 60(b)(5) for relief on the grounds that "it is no longer equitable that the judgment have prospective effect." An Order of Dismissal is not a judgment having prospective effect.

Additionally, even if the dismissal order did have "prospective effect" relief is not available to petitioner as any relief sought under Fed. R. Civ. P. 60(b) must be requested within a "reasonable time." *Delzona Corp. v. Sachs*, 265 F.2d 157 (3d Cir. 1959). Petitioner has attempted to assert throughout its Petitioner that process was not originally served on International because it was not within the jurisdiction of the District Court. Now, it contends that long-arm service is available upon the ship owner's agent. This argument is without merit since such "long-arm" service was available to petitioner since at least 1958 (see Fed. R. Civ. P. 4(e)(i) and New Jersey *R.R.* 4:4-5 (1958)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States
October Term, 1978

No. 78-174

M.W. ZACK METAL COMPANY, Petitioner,

v.

SS SEVERN RIVER, JANSEN & CO.
CONTAM LINIE, and HANS H. JANSEN, Respondents.

REPLY TO RESPONDENT's BRIEF OPPOSING THE GRANT OF A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents assert that Petitioner has not complied with Rule 19 and that process in the 1961 suit in the New Jersey District Court could have been served at least since 1958. Both of these statements are incorrect.

I

THE PETITION INVOKED AS REASONS FOR THE GRANT OF IT A CONFLICT BETWEEN CIRCUITS, A DISREGARD OF SETTLED PRINCIPALS OF ADMIRALTY PLEADINGS, AND A DISREGARD OF ADMIRALTY'S EQUITY POWERS, FOR WHICH REASONS THIS HONORABLE COURT HAS JURISDICTION AND THE QUESTIONS ARE OF GREAT CONCERN IN THEIR RESPECTIVE SPHERES OF JURISPRUDENCE.

Two conflicts are raised by the decision below. The first was regarding the operation of Cogsa's time-bar provision 46 USC 1303(6). The decision under review refused to decide as the Second Circuit had in Ore S/S Co. v. Hassel, 137 F.(2) 326, 329, and as the Fourth Circuit had in Int[illegible]o-Rotterdam Inc. v. Tomsen, 218 F.([illegible] Yet, suits had been started against the owner, the charters and the vessel in one court or another in 1961 before the said Statute had become operative.

Furthermore, there is a direct conlict between the Fourth Circuit's decision in M.W. Zack Metal Co. v. International Navigation Corp. of Monrovia 510 F.(2) 451, and

its prior decision, appendix D to this petition, which had acknowledged that Cogsa's time-bar in this case by the filing of the suits in 1961 was inoperative. See Petiton, p. 36.

II

THE LONG ARM STATUTE WAS NOT AVAILABLE FOR SERVICE OF FEDERAL PROCESS.

It was not until Rule 4(f) was amended, effective July 1, 1963, that service of Federal process could be made outside the territorial limitations of the State in which the district court was located, and, not until after July 1, 1966 that process in Admiralty was made to conform to process in a civil suit, the statement of respondent that it was available in 1958 to the contrary notwithstanding. Besides, this suit was already dismissed without prejudice before 1966 and the suit in Germany was being processed, though slowly. Only one recovery could be had. It caused no

prejudice to respondents that the German suit was prosecuted through to judgment and appeals. When those judgments were of the sort that left further prosecution of plaintiff's original claim open, see pp. 42-43 of petition, and as plaintiff has received no payment of the judgment in Germany, it sought to prosecute the litigation that was still pending because its dismissal was not on the merits. Wasn't the denial of that right to proceed, a misapplication of Admiralty's power to favor disposition of suits on the merits, and which, incidentally, require a liberal construction of the Rules of Federal Civil Procedure and of Cogsa's Statute of Limitation.

These misapplications are argued in the petition set before this court as errors in subjects which are worthy of resolution by this court; see Swift & Company Packers et al. v. Compania Columbia del Carribe S.A. et al., 339 U.S. 684,

70 S.Ct. 861, 94 L.ed. 1206.

WHEREFORE, it is respectfully submitted that the questions presented are of application to the equity jurisdiction of Admiralty and presents a conflict of decisions between circuit courts which are repugnant to justice within the Federal Court system, calling upon the Appellate powers of this honorable court to sit in review.

Respectfully submitted,

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